IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 59

UNITED BROTHERHOOD OF ARMORERS, AFL-CIO, AND LOCAL 1625, UNITED BROTHERHOOD OF ARMORERS, AFL-CIO,
*Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD AND CARRIER CORPORATION.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

## BRIEF FOR RESPONDENT CARRIER CORPORATION

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## Authorities Cited

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 89

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND LOCAL 5895, UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD AND CARRIER CORPORATION.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

## BRIEF FOR RESPONDENT CARRIER CORPORATION

### OPINIONS BELOW

The Opinion of the Court of Appeals, as amended, on Petition for Rehearing (R. 385-418, 438-441) is reported at 311 F.2d. The Decision and Order of the Board (R. 312-373) are reported at 132 NLRB 127.

### JURISDICTION

The judgment below was entered on October 18, 1962 (R. 419), and Petitions for Rehearing were denied on December 12, 1962 (R. 443-444). The Petition for Writ of Certiorari was filed on March 12, 1963, and was granted on May 13, 1963 (R. 444). The jurisdiction of this cause rests upon 28 U.S.C. 1254 (1).

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (sometimes referred to herein as the "Act"), 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq*, are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8. . . . (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organiza-

tion has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .

• • •

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

## QUESTIONS PRESENTED

1. Whether Section 8(b)(4)(B) of the National Labor Relations Act prohibits a union, engaged in primary picketing at an industrial plant, from picketing a railroad's property which is nearby and, in part, adjoins that of the industrial plant with the object of forcing the railroad to cease transporting the products of the industrial plant.

2. Whether the balancing of interests doctrine generally followed in common situs cases under Section 8(b)(4)(B) involving peaceful picketing is applicable under Section 8(b)(4)(ii)(B) where the union conduct complained of consists of threats, restraint and coercion in violation of Section 8(b)(1)(A) of the Act.

## STATEMENT OF THE CASE

### A. The Facts

On and after March 2, 1960, in support of an economic strike against Carrier Corporation (hereinafter called "Carrier"), the petitioning unions picketed each of the eight plant entrances at Carrier's Thompson Road plant in Syracuse, New York. The picketing was accompanied

by threats and violence on the part of the unions (R. 316; 362-363; G. C. Exh. 9; R. 51, 311).

The Carrier plant fronts on the east side of a north-south highway known as Thompson Road. Behind Carrier's facilities is a plant of the General Electric Company. South of and adjacent to the two plants are east-west railroad tracks of the New York Central Railroad on a right of way owned since 1949 (R. 49, 67, 73, 74) by the railroad. Immediately south of and adjacent to the railroad right of way are two other industrial plants, both fronting on Thompson Road.

The railroad tracks described above serve all four of the above-described plants by a series of spurs and are enclosed by a chain-link fence, which also encloses the Carrier property. In the fence is a railroad gate, also fronting on the east side of Thompson Road, through which trains enter upon and leave the sidings and spurs lying on the railroad property. The railroad gate is on the railroad's right of way and when not being used by the railroad the gate is kept locked, with a key in the possession of railroad personnel. Carrier employees are not permitted access to Carrier property through the railroad gate and right of way (G. C. Exh. 9; R. 51, 311; R. 319, 363).[1]

Although the railroad employees involved herein were not represented by the unions, petitioners herein, the railroad gate described above was picketed on or about the commencement of the strike (R. 81, 82, 316, 319), and was

[1] The Petitioners' statement of the facts is misleading in that it makes it appear that this railroad gate was but a plant gate of Carrier, the primary employer. Thus, the Petitioners state (Pet. Br., p. 4), that the union "picketed the various entrances to the plant premises. One of the entrances picketed . . . is that which is used by the New York Central Railroad in making pickups and deliveries at Carrier."

the scene of several incidents, the most serious of which took place March 11, 1960. On that date a train, manned by nonsupervisory railroad employees, was stopped at the gate by the pickets and was not permitted to enter until the trainmaster assured the pickets that the Carrier plant would not be served. After switching cars for the other plants; the train—manned this time by railroad supervisors—again attempted to enter upon railroad property through the railroad gate. Thirty to sixty massed pickets—both on the east *and west* sides of Thompson Road—sought forcibly to restrain the train's movements. Pickets who were lying on the tracks in front of the train had to be removed physically by police officers. A staff representative of the unions drove his automobile onto the track during the switching operation and it, too, had to be removed by police officers before the train could continue. An attempt—attributed to the unions by the Trial Examiner—also was made to damage the train by greasing the track and setting the switch in such a manner as to derail the train. Also, the railroad supervisor in charge of the train was challenged by a union picket to get down off the engine "for the purpose of getting my block knocked off" (R. 82, 86-94, 136, 316, 319-323; G. C. Exh. 6, 7; R. 52, 309, 310).

### B. The Decision of the Board

Upon the foregoing facts, the Trial Examiner concluded that the unions had violated Sections 8(b)(4)(i) and (ii)(B) and 8(b)(1)(A) of the Act (R. 325, 327, 335-337, 340). The Board, in agreement with the Trial Examiner, found violations of Section 8(b)(1)(A) of the Act (R. 362, 363).

The Board majority, however, reversed the Trial Examiner with respect to the violations of Section 8(b)(4) and dismissed the portions of the complaint relating thereto

on the ground that *Local 761, Electrical Workers (General Electric Co.)* v. *N.L.R.B.*, 366 U.S. 667 (1961) (hereinafter sometimes called "*General Electric*"), was dispositive (R. 363-364, 368). The Board majority opinion likened the railroad's gate to a separate gate of a single employer and held that, because the services performed by the railroad were services rendered in connection with the normal operations of Carrier, the Act was not violated (R. 365-366). Member Rodgers dissented, arguing that the majority decision was in direct contravention of the 1959 amendments to the Act; that reliance on *General Electric* was misplaced because property of a secondary employer rather than the "reserved gate" of a primary employer was involved; and that the picketing was peaceful in *General Electric*, rather than accompanied by threats and violence as was true in the instant case (R. 369-371).

### C. The Decision of the Court of Appeals

The Court of Appeals for the Second Circuit reversed the decision of the Board as it related to Section 8(b)(4)(i) and (ii)(B), Chief Judge Lumbard dissenting.

After a detailed analysis of the development of secondary boycott law (R. 388-404), the court identified the emergent doctrine as one that required picketing to be conducted in such a manner and at such a place so as to minimize the impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees (R. 402-403). The court added (R. 403-404):

> The relevance of these principles to the issue before us is clear. In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's

premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and *sole* objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives, *DiGiorgio Fruit Corp.* v. *N.L.R.B.*, 191 F.2d 642 (D. C. Cir., 1951), here involved no such redemptive feature. The actions of the union were thus in violation of §§ 8(b)(4)(i) and (ii)(B) of the Act.

The Court of Appeals went on to note (R. 406-407) that this Court in *Local 761, Electrical Workers (General Electric Co.)* v. *N.L.R.B.*, 366 U. S. 667 (1961), found picketing at a reserved gate on and to an employer's primary premises to be violative of section 8(b)(4)(B) where such gate was exclusively used by employees of neutral employers; but that such finding of illegality was limited to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. The court added (R. 407-408):

> In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing *at the premises of the primary employer. Local 761 (General Electric), supra*, at 679, 681. (Emphasis by the court)
>
> In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made.
>
> We do not find in *General Electric* a policy of the Supreme Court to exempt from the Act's proscrip-

tions all union attempts to keep deliveries from being made to a struck plant, wherever and however such attempts are made. Yet it is this position for which the Board now earnestly contends. Were we to accept such a doctrine, however, we should not be able to distinguish attempts to prevent deliveries from attempts directly to interfere with other business relations between the struck employer and his suppliers or customers. Congress might have written § 8(b)(4) to apply only to union interference with business relations between a struck employer's suppliers and customers and *their* suppliers and customers. It did not do so, nor have the courts failed to find violations of the Act where union activities directly interfered with relations between a struck employer and secondary parties dealing with him. See, e.g., *Local 1976, United Brotherhood of Carpenters (Sand Door & Plywood Co.)* v. *N.L.R.B.*, 357 U. S. 93 (1958).

We do not read *Local 761 (General Electric Co.)* v. *N.L.R.B., supra,* to conflict with our disposition of the case at bar.

The dissent (R. 408-418) would—on the facts of this case—disregard both the locus of the picketing and the ownership of the property picketed and find the picketing not to be violative of section 8(b)(4)(B) since the picketing was only designed to reach neutral employees whose tasks aided Carrier's everyday operations and, therefore, was legitimate primary activity (R. 415-416).

## SUMMARY OF ARGUMENT

### I.

A. In 1959 the Congress amended Section 8(b)(4) of the Act to extend said section's protection to railroads and their employees. The stimulus for such amendment was precisely the kind of adjacent railroad site picketing and violence engaged in by petitioners in this case; and the

legislative history of said amendment to Section 8(b)(4) demonstrates that it was the clear intent of Congress to proscribe such conduct. By refusing to extend this contemplated protection of the statute to the railroad and railroad employees here involved, the Board acted in direct contravention of congressional purpose.

B. Congress in fact did amend Section 8(b)(4)(B) of the Act to proscribe exactly what it intended to proscribe and, as the Board concedes, petitioners' conduct falls within the literal proscription of said Section 8(b)(4)(B).

C. The Board decision herein either discriminates against railroads by refusing them the protection extended to nontransporters of goods under Section 8(b)(4)(B) of the Act; or said decision stands for an unwarranted decimation of said Section 8(b)(4)(B). Both alternatives are contrary to law.

D. Petitioners' conduct complained of herein took place at premises separately owned by a completely independent secondary employer with whom petitioners had no dispute. Without explanation, the Board says this separateness of corporate identity and ownership is immaterial. Such disregard by the Board for separate and private ownership is inconsistent with its own contemporary decisions and is contrary to law.

E. In *General Electric* this Court dealt with restrictions on, and permissible limits of, primary picketing and did not intend to relax the law's sanctions against purely secondary picketing such as confronts the Court in this case. Accordingly, the Board in its decision herein erred in utilizing the *General Electric* rationale to avoid applying the proscriptions of Section 8(b)(4)(B) to the picketing herein.

## II.

Even if this case were to be regarded as being analogous to a common situs problem wherein it is normally proper to balance the legitimate conflicting interests of unions and neutral employers, petitioners' threats, restraint and coercion directed to railroad supervisors are still violative of Section 8(b)(4)(ii)(B) of the Act in that the balancing of interests doctrine only applies where the union conduct is otherwise lawful. Here, petitioners' threats, restraint and coercion were held by the Board to be violative of Section 8(b)(1)(A) of the Act.

## ARGUMENT

### I. WHEN THE PETITIONING UNIONS, AT PREMISES SOLELY OCCUPIED BY A NEUTRAL EMPLOYER, PICKETED AND COERCED INDIVIDUALS EMPLOYED BY THAT NEUTRAL EMPLOYER WITH THE OBJECT OF FORCING THE NEUTRAL EMPLOYER TO CEASE TRANSPORTING MATERIALS OF A PRIMARY EMPLOYER WITH WHOM THE UNIONS HAD A LABOR DISPUTE, SAID UNIONS VIOLATED SECTION 8(b)(4)(i) AND (ii)(B) OF THE ACT.

#### A. The Board's Decision is in Direct Contravention of the Congressional Purpose Expressed in the Labor-Management Reporting and Disclosure Act of 1959 to Bring Railroad Employees Within the Protection of the Secondary Boycott Provisions of the Act.

Section 704(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 542-543, amended Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158 (b)(4), by extending the protection of said section to a "person" engaged in commerce, as well as any individual employed thereby. Previously, Section 8(b)(4) had only protected "employees" and "employers."

The legislative history of this amendment shows a clear intent both by proponents and opponents thereof to protect railroads and railroad employees from secondary boycotts. Senator Morse, who cast one of the two votes in the Senate against the bill on final passage, in speaking of his willingness to go along with some modifications on the subject of secondary boycotts, said:

> Similarily [sic], a secondary boycott carried out by inducing railroad employees should not be permitted, merely because the employees' employer is not covered

by the Act. (105 Daily Cong. Record 16397, September 3, 1959.)

Further, the then Senator Kennedy and Congressman Thompson prepared an analysis of the secondary boycott amendments contained in the Landrum-Griffin Bill after it passed the House; and although some changes were made affecting the analysis during the conference, they do not detract from the relevance of the following statements contained therein:

1. Railroad-Airline, and Public Employees

The NLRA definitions of "employer" and "employee" exclude various special categories of employees among them agricultural workers, Government employees and employees of railroads and airlines who are subject to the Railway Labor Act. Since Section 8(b)(4) presently speaks of inducing "the employees of any employer," it does not apply to these groups.

The House bill extends the prohibition to secondary boycotts by agricultural workers, Government employees and employees of railroad and airlines. Apparently the theory is that the omission was simply a mistake in the original draftsmanship.

The unions argue that since these groups receive none of the benefits of the NLRA they should be subjected to none of the burdens. The railway labor organizations particularly dislike the prospect of involvement with the NLRB. These arguments have some appeal but they do not carry much weight since the employees who would be forbidden to engage in secondary boycotts have little to gain or lose from such activity.

We could not seriously object to revising the present law in this respect. (105 Daily Cong. Record 15220-15221, August 20, 1959; Legislative History of the La-

bor-Management Reporting and Disclosure Act of 1959, volume 2, pages 1706-7.)

Lastly, Congressman Griffin, one of the authors of the House bill, in his analysis of the conference agreement, said with respect to the secondary boycott amendment that it:

> 3. Closes loopholes which permitted secondary boycotts involving railroads, municipalities, and governmental agencies because their employees were not "employees" under definition in the act. (105 Daily Cong. Record 16539, September 3, 1959; Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, volume 2, page 1712.)

As pointed out in the dissent of Board Member Rodgers in the Board decision herein (R. 369-370), these so-called "loopholes" were brought about by the Board's repeated holdings that railroad employees were not employees within the meaning of the Act and therefore were not entitled to the protection of the Act's secondary boycott provisions. *International Brotherhood of Teamsters (The International Rice Milling Co.)*, 84 NLRB 360 (1949); *International Woodworkers of America (W. T. Smith Lumber Co.)*, 116 NLRB 1756 (1956); *International Brotherhood of Teamsters (The Alling & Cory Company)*, 121 NLRB 315 (1958); *Lumber & Sawmill Workers Local Union 2409 (Great Northern Railway Co.)*, 122 NLRB 1403 (1959). This theory of the Board was uniformly discredited in every case where the issue was presented to a Court of Appeals, *International Rice Milling Co.* v. *N.L.R.B.*, 183 F.2d 21 (C.A. 5, 1950); *W. T. Smith Lumber Co.* v. *N.L.R.B.*, 246 F.2d 129 (C.A. 5, 1957); *Great Northern Railway Co.* v. *N.L.R.B.*, 272 F.2d 741 (C.A. 9, 1959); and was repudiated by the United States Supreme Court, *Teamsters Union* v. *N.Y., N.H. & H.R. Co.*, 350 U.S. 155 (1956).

The practical difficulty of the railroads prior to the 1959 amendments was the lack of statutory protection for them from the very type of picketing here confronting this Court; i.e., picketing of railroad property adjacent to or nearby the property of the industrial employer with whom the unions had a labor dispute. This is demonstrated by the fact that this type of picketing was involved in all of the above-cited Board cases.

Thus, in *International Rice Milling*, 84 NLRB 360 (1949), the union was picketing extrances to the primary employer's plant and then extended its picketing and acts of violence to the adjacent and nearby tracks of the railroads serving the primary employer's plant. The Board refused to find a violation of Section 8(b)(4) on the ground that the railroad was not an employer within the meaning of the Act and, therefore, was not entitled to the protection of said Section 8(b)(4).[2]

Another parallel is found in the *Great Northern Railway* case where a primary strike was first confined to entrances of the employer's plant proper. Later when the railroad attempted to switch cars on to the primary premises the picketing was broadened to include the railroad spur serving the plant. The Board, although concluding that the picketing was a deliberate and direct appeal to the train crews to engage in a concerted refusal to switch the cars, again dismissed on the basis that railroad employees were not covered by the secondary boycott provisions. When the case was reversed on this point and remanded, the Board found a violation without expressing the slightest

[2] The Court of Appeals reversed the Board on this point, *International Rice Milling Co.* v. *N.L.R.B.*, 183 F.2d 21 (C.A. 5, 1950); and thereafter, in accordance with said court's decision, the Board ordered the union to cease and desist from such adjacent railroad spur type picketing. *International Rice Milling Co.*, 95 NLRB 1420 (1951).

concern about the fact that the railroad spur served only the employer's plant. *Lumber and Sawmill Workers Local Union 2409 (Great Northern Railway Co.)*, 126 NLRB 57 (1960). It was enough that secondary employees were being induced at the premises of a secondary employer.

Nor can there be any doubt that adjacent right of way picketing, and the Board's treatment thereof, were indeed the "loopholes" which the Congress intended to close. This is not only demonstrated by the legislative history of the 1959 amendments but was conceded in 1960 by the then General Counsel of the Industrial Union Department, AFL-CIO; and is now admitted by the Board.

Thus, it was precisely the adjacent railroad spur type of picketing and violence found in the original Board decision in the *International Rice Milling* case (84 NLRB 360)—and here—which the advocates of closing the railroad "loopholes" presented to the Congress in justification of the needed legislation.[3] Further, it was precisely the failure of the Senate Committee on Labor and Public Welfare, in reporting out S. 1555, to provide for the closing of the "loophole" represented by the adjacent railroad spur type picketing found in the original Board decision in *International Rice Milling* which caused Senators Dirksen and Goldwater to criticize said bill[4] and which led to an attempted amendment of said S. 1555 by Senators Dirksen and Goldwater.[5] Although the Dirksen-Goldwater amend-

[3] Part 5, Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, Eighty-Sixth Congress on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474; pp. 1846-1860, at p. 1847; Published by the United States Printing Office, Washington, 1959.

[4] S. Rep. No. 187 on S. 1555 (minority views), Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume 1, p. 476.

[5] 105 Daily Cong. Record 5747, 5764, April 21, 1959.

ment was defeated, the Senate eventually acceded to the Landrum-Griffin proposals of the House with the result that, as enacted, the 1959 amendments closed the railroad "loophole" in precisely the same language and manner as contemplated by the aforesaid Dirksen-Goldwater amendment. In a memorandum analyzing the various provisions of the 1959 amendments, as enacted[6], Senator Goldwater stated as follows[7]:

> The Kennedy-Ervin bill (S. 505), as introduced, contained no provision dealing with secondary boycotts. In committee, I offered the secondary boycott provision of the administration's labor reform bill as an amendment. It was, in substance, the same as the new provisions described above. It was rejected and the bill as reported contained no such provision. On the Senate floor, Senator McClellan offered a secondary boycott amendment which, in substance, was the same as that offered in committee by me. The amendment was not agreed to.
>
> The Landrum-Griffin bill contained a provision on secondary boycotts, for all purposes practically the same as that contained in my rejected amendment. With the exceptions noted above, the conference report adopted these provisions of the Landrum-Griffin bill.

Moreover, in a 1960 law review article co-authored by the then General Counsel of the Industrial Union Department, AFL-CIO, it was stated[8]:

> Advocates of tightening these [secondary boycott] restrictions, however, argued that the National Labor Relations Board and the courts had so interpreted section 8(b)(4) as to leave a number of gaping loop-

[6] 105 Daily Cong. Record A8509-A8526, October 2, 1959.

[7] 105 Daily Cong. Record A8523, October 2, 1959.

[8] *Title VII: Taft-Hartley Amendments, with Emphasis on the Legislative History*, 54 Northwestern Univ. Law Review 747, 756-757, Arthur J. Goldberg and Kenneth A. Meiklejohn.

holes through which genuinely neutral employers and their employees continued to be victimized by the use of the secondary boycott.[26]

The new law closes these so-called loopholes in the following manner:

* * *

(2). Formerly, section 8(b)(4) did not apply to inducement of employees of employers not covered by the National Labor Relations Act, as amended *(International Rice Milling*[28] . . . ). The new act prohibits inducement of employees of any person engaged in commerce . . . including . . . railroad employees.

[26] S. Rep. No. 187, 86th Cong., 1st Sess. 78 (1959) (minority views).

[28] 84 NLRB 360 (1949).

As noted above, the original Board decision in *International Rice Milling* cited by the now Mr. Justice Goldberg countenanced the same type of adjacent railroad spur picketing as is involved in the instant case.

Finally, the Board in its brief to this Court in this case (Bd. Br. p. 23, n. 17 and related text) illustrates the "loophole" which Congress intended to close by the 1959 amendments *by citing cases involving the same type of adjacent railroad spur picketing which now confronts this Court in this case.*

Accordingly, Carrier submits, it is patent that it was exactly the type of factual situation now before this Court which led the Congress to extend the protection of Section 8(b)(4) to railroads and railroad employees. The Board decision herein is in complete derogation of that Congressional purpose and would in fact result in even less protection than that which the courts were seeking to provide when the 1959 amendments were enacted.

**B. It is not Disputed that Petitioners' Conduct Herein Falls Within the Literal Proscription of Section 8(b)(4)(B).**

Before proceeding to an analysis of pertinent case law and facts, Carrier emphasizes that the immediately preceding treatment of the legislative history of the 1959 amendments was not necessitated by any ambiguity in the language of Section 8(b)(4)(B). To the contrary, the legislative history was offered to show that Congress intended to proscribe that which it explicitly did proscribe: the picketing of railroad-owned spur tracks adjacent to or nearby the industrial plant of a primary employer with whom a union has a labor dispute.

In short, petitioners' conduct herein falls within the literal proscription of the provisions of Section 8(b)(4)(B) and the Board admits that it does. Thus at page 12 of its brief to this Court the Board states:

> . . . It is clear that the acts [of petitioners] complained of in the present case are covered by clauses (i) and (ii) [of Section (8)(b)(4)]. Moreover, since the "object" of the picketing was to bring about a cessation of the railroad's normal services to the struck plant, the conduct appears to come within the literal terms of clause (B) [of Section 8(b)(4)] . . .

We thus start with the proposition that Congress intended to proscribe petitioners' conduct herein and in fact enacted statutory language which unambiguously effected such intent. It would seem this is not only a start but an end to the questions before this Court. But notwithstanding the above, the Board insists that petitioners' picketing is primary in nature and therefore not proscribed by Section 8(b)(4)(B) of the Act. It is to this proposition we now turn our attention. At the outset, however, it is noted that

the Board never answers one important question. If the Congress did not consider adjacent railroad spur type picketing to be secondary, why did Congress specifically amend the secondary boycott provisions of Section 8(b)(4) to proscribe it? Does the Board contend that its so-called expertise should override both the literal language of the statute and congressional intent?

### C. The Board Decision Herein Either Discriminates Against Persons Engaged in the Transport of Goods or Presages the Administrative Repeal of Section 8(b)(4)(B) of the Act.

To better understand the full import of the Board decision herein it is helpful and perhaps essential to summarize the instant facts without regard to the type of services rendered to Carrier by the railroad herein. Thus stated, the facts show the following. Petitioners' picketing took place on and at a gate leading to premises owned by a secondary employer, upon which only employees of the secondary employer entered or worked, and where the work performed consisted of that done in the secondary employer's normal business relations not only with Carrier but with several other employers; to wit: Western Electric, General Electric and Brace-Mueller-Huntley.

Obviously, when so framed the descriptive facts herein would embrace picketing at a secondary railroad's central freight office; at a store of a secondary employer where Carrier products—among others—were sold or used; or, in fact, at the industrial plant or establishment of any secondary employer having normal business relations with—among others—Carrier. Moreover, the facts *must* be so framed; i.e., without regard to the *type* of business relationship between the primary and secondary employers; if we

are to reach a result herein which would not unlawfully discriminate against railroads. This is so because the normal business of railroads is the transport of goods and the proscribed objects set forth in clause (B) of Section 8(b)(4) do not distinguish between the types of business relationships involved. Thus, said clause (B) proscribes "forcing or requiring any person to cease using, selling, handling, *transporting*, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . ."

With this established, it is essential to inquire whether the Board in this case intended to discriminate against transporters of goods or whether it would countenance picketing at the premises of any similarly situated secondary employer having normal business relations with Carrier. Stated another way, the question presented is what factors —other than the *type* of business relations between Carrier and the railroad—could have led the Board to call the picketing herein primary rather than secondary.[9]

Accordingly, let us examine the other factors present in this case. They consist of the normal business relations between the primary and secondary employer; the fact that petitioners' picketing, threats and other coercive tactics were only aimed at making the secondary employer (the railroad) cease doing business with the primary employer (Carrier) and not at stopping the business relations between the railroad and its other customers (i.e., Western Electric, General Electric, and Brace-Mueller-Huntley); the fact that the picketed premises of the secondary employer adjoined or were nearby those of the primary em-

[9] As noted above (*supra*, p. 18, the Board considers the crucial question herein to be whether Petitioners' picketing was primary or secondary (Bd. Br. p. 12).

ployer; and the fact that the picketed premises of the secondary employer once belonged to the primary employer.

Examining these four factors in turn, it becomes quickly apparent that the existence of a normal business relationship between Carrier and the secondary employer could not properly militate against affording the secondary employer the protection of Section 8(b)(4)(B). Thus, where the neutral employer was a purchaser of the primary employer's products, picketing of the neutral employer's establishment clearly would be unlawful. *Electrical Workers (Samuel Langer)* v. *Labor Board*, 341 U.S. 694 (1951). The same result would obtain if the neutral employer was a supplier of the primary employer, *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951); or delivered the primary employer's products, *Carpenters Union (Sand Door and Plywood Company)* v. *N.L.R.B.*, 357 U.S. 93 (1958); *N.L.R.B.* v. *Local 294, Internat'l Bro. of Teamsters (Bonded Freightways, Inc.)*, 273 F.2d 696 (C.A. 2, 1960); or handled the primary employer's products at a trucker's dock, *Highway Truck Drivers & Helpers Local 107 (Virginia-Carolina Freight Lines, Inc.)* v. *N.L.R.B.*, 273 F.2d 815 (C.A. D.C., 1959); and see particularly *N.L.R.B.* v. *Associated Musicians (Gotham Broadcasting Corp.)*, 226 F2d 900 (C.A. 2, 1955). Indeed, it would be highly unusual if the activity of the secondary employer, other than in some construction cases, was not related to the normal operations of the primary employer. Otherwise, there would be little point in the union's attempt to involve the secondary employer or his employees and thus put economic pressure on the primary employer.

Similarly, the fact that the object of petitioners' conduct was to make the secondary employer cease doing business only with Carrier and not its other customers is no legiti-

mate basis upon which to withhold the protection of Section 8(b)(4)(B). For as the Board pointed out in its main brief to this Court in *Electrical Workers (General Electric Co.)* v. *Labor Board*, 366 U.S. 667 (hereinafter sometimes called the *General Electric* case):

> . . . Section 8(b)(4)(A) bans partial no less than total refusals to work . . .[10]

Indeed, a contrary conclusion would make little sense. Section 8(b)(4)(B) proscribes the forcing of a secondary employer to cease doing business with a primary employer. It is not a prerequisite for unlawfulness that the union force the secondary employer to cease doing business with *all* other employers.

The next factor presented is Carrier's sale of the secondary premises herein to the railroad some eleven years before the occurrence of the labor dispute herein. There, although the Board does not even allege that said property was sold for other than valid economic reasons, it professes alarm over this sale; and, in support, offers the conjecture that any employer could prevent union appeals to neutral delivery employees "merely" by deeding its parking areas and driveways to a secondary employer (Bd. Br., p. 22). There are several answers to this. First, there is no such discriminatory motivation behind the sale in this case. Second, the sale envisaged by the Board would be motivated—clearly so—by a desire to interfere with le-

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[10] Main brief for the National Labor Relations Board, p. 37, in *Electrical Workers* v. *Labor Board*, 366 U.S. 667. In footnote 32 of said brief, pp. 36-37, the Board cites some 10 federal court decisions in support of this well established proposition, including the decision of this Court in *Local 1976, Carpenters' Union* v. *N.L.R.B.*, 357 U.S. 93, 96-97 (the refusals to handle American Iron freight). *Note:* Prior to the 1959 amendments the proscriptions now found in clause (B) of Section 8(b)(4) appeared in clause (A) thereof.

gitimate concerted activity protected by Section 7 of the Act and, therefore, would in all probability be set aside—similar to other discriminatorily motivated acts of employers—as being in violation of Section 8(a)(1) or (3) of the Act. Third, the Board's fears are completely divorced from the realities of economic life. To emphasize this, let us again eliminate—for the moment—the Board's preoccupation with the accoutrements of transporters of goods; i.e., parking lots, driveways, and railroad tracks; and substitute other physical facilities of industry. Thus transposed—and it must be transposed unless the Board is bent upon discriminating against transporters of goods—the Board would apparently fear that if J. C. Penney were engaged in a labor dispute at one of its stores, it would sell the remainder of its stores to Sears & Roebuck and thus prevent a union from picketing such other stores. Clearly, the Board's fears are fantasy. Also, judging from the fact that the property sale in this case preceded the labor dispute by some eleven years, the Board's approach would bottom an 8(b)(4) violation on a title search to see if the primary employer *ever* owned the secondary premises. And surely the Board will not contend that it would have found petitioners' conduct herein violative of Section 8(b)(4)(B) if the primary labor dispute had been with one of the other three emloyers having plants adjacent to the railroad's premises—employers who never owned what is now the railroad's property.

The last factor for consideration is the adjacent nature of the two premises herein involved; and in this regard it is first noted that the Board has never before measured the legality of secondary boycotts with an odometer. Thus, as noted above, in *Great Northern Railway Co.*; 122 NLRB 1403, the Board refused to find that the picketing of an

adjacent railroad spur was violative of Section 8(b)(4) and based said refusal on the ground that railroad employees were not covered by said section's secondary boycott provisions. When the Court of Appeals reversed the Board on this point; *Great Northern Railway Co.* v. *N.L.R.B.*, 272 F.2d 741 (C.A. 9, 1959); the Board found a violation of Section 8(b)(4) without expressing the slightest concern over the fact that the railroad's premises were adjacent or nearby to the primary employer's plant. *Great Northern Railway Co.*, 126 NLRB 57. The same substantive facts and sequence of events are present in *International Rice Milling Co.*, 84 NLRB 360 (1949); *International Rice Milling Co.* v. *N.L.R.B.*, 183 F.2d 21 (C.A. 5, 1950); and *International Rice Milling Co.*, 95 NLRB 1420. Moreover, in *N.L.R.B.* v. *Denver Bldg. Trades*, 341 U.S. 675, a secondary boycott case, this Court stated (pp. 689-690):

> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other.

And in *Bachman Machine Company* v. *N.L.R.B.*, 266 F.2d 599 (C.A. 8, 1959)—another secondary boycott case where both the primary and secondary employers operated industrial plants—the court, in commenting on this Court's above-quoted language in *Denver Bldg. Trades*, stated (p. 605):

> This would seem to indicate that the proximity of employers to each other was not of significance.

Carrier concurs. To accept the Board's holding in the instant case would be to redefine the term "secondary em-

ployer" so as to make such designation dependent on the physical distance of the primary employer's plant from that of the secondary employer; and under such interpretation there could be no logical delineation between a secondary employer whose plant was separated from the primary employer's plant by a common wall, an open lot, a city block or many miles. Clearly, once the picketing extends to the situs of a separate employer—whether such situs be adjoining or distant—the sole test of its unlawfulness is its object. And here the petitioners' object was admittedly (Bd. Br. p. 12; R. 325) the proscribed one of forcing the railroad to stop doing business with Carrier. Any fiction that petitioners' conduct at the railroad's gate was merely incidental to the primary strike and was not aimed at forcing the railroad to cease doing business with Carrier is dispelled by the fact that when the pickets became aware that an attempt was being made to serve Carrier, they crossed to the *west* side of Thompson Road and onto railroad property to meet the train and commence their physical obstruction of its progress (R. 320-321, 87-88). Importantly, this particular piece of conduct by the petitioners took place on railroad property not adjoining Carrier's plant, but on railroad property separated from the Carrier plant by a highway. This but illustrates the impossibility of attempting to define secondary activity in terms of its physical distance from the primary employer's premises; and the question could be asked of the Board how far would it permit the strikers to go up the railroad's tracks on the railroad's right of way to meet, obstruct and restrain the incoming train? Again, it is submitted that there can be no possible logical delineation in terms of physical distance as to where such conduct would become unlawful. And, of course, the practical effect of a contrary contention would be to penalize those many employers who have clustered

together for legitimate economic reasons and who have thereby created industrial centers across the land.

Accordingly, by virtue of the foregoing process of analyzing factors herein without regard to the type of business relation between Carrier and the railroad it becomes evident, we submit, that there is no nondiscriminatory support in this case for the Board's conclusion that petitioners' conduct herein was primary, not secondary. Clearly, the preoccupation of the Board and petitioners with pick-ups and deliveries has led them to improperly submerge the requirements of Section 8(b)(4)(B) that transporters of goods be given the same protection as companies who are engaged in "using, selling, handling, . . . or otherwise dealing in the products of any other producer, processor or manufacturer . . ." This is further evidenced throughout the briefs filed herein by the Board and petitioners in their repeated allusions to the railroad gate as, or analogous to, a plant delivery gate of Carrier. In fact, said gate does not open on to Carrier property. And again, if we summarize the instant facts without the Board's discriminatory accent on the type of service rendered to Carrier by the railroad, we have the Board improperly refusing to invoke the proscriptions of Section 8(b)(4)(B) in a situation where the picketing takes place on and at a gate leading to premises owned by a secondary employer; premises upon which only employees of the secondary employer enter or work; premises where the work of the secondary employees is in support of the secondary employer's normal business relations with several other employers besides the employer with whom the union has its primary labor dispute. As noted at the outset of this portion of the brief, the Board decision herein either discriminates against all persons engaged in the transport of goods or it stands for an un-

warranted decimation of the protection afforded by Section 8(b)(4)(B) of the Act. The former is suggested. Both are contrary to law.

**D. The Board Improperly Disregards the Concept of Private Property as Immaterial to its Decision Herein.**

Carrier owns the primary premises herein. The New York Central Railroad owns the picketed secondary premises herein. Carrier and the New York Central Railroad are separate corporate entities. They are not commonly owned.

None of the above is disputed. The Board merely says it is immaterial (R. 365). It does not say why. Indeed, the short shrift given the concept of private ownership in the Board's decision suggests the concept was first noticed after the Board reached its conclusion therein; and then, not being able to reconcile the two, the Board sought to make the fact of separate ownership disappear by labeling it immaterial.

However, and whatever the Board chooses to say or not say, its disregard of the separate and private ownership herein is improper; and we know of no prior case where primary employees did not work or go upon the secondary premises—excepting certain "ally" doctrine situations not pertinent here—in which separate ownership and occupancy of premises did not determine whether said premises were primary or secondary.

Further, the Board has held that the secondary boycott provisions of Section 8(b)(4) "do not isolate one store in . . . [a] Company's chain from the other stores therein, nor do those provisions provide that economic pressure may be applied upon a primary employer only at the segment of his operations at which the immediate dispute arose." See *International Bro. of Teamsters (Alexander Warehouse),*

128 NLRB 916, 919-920, n. 6 (1960). Accordingly, it appears that at least where the concept of corporate entity works to permit picketing, the Board considers it extremely important. Similarly, where a union picketed the wholly-owned subsidiary of a parent company with which the union had a primary dispute, the fact of the two companies' common ownership was emphasized by the Board in holding that said picketing was not proscribed by Section 8(b)(4). See *Local 200, Teamsters (Milwaukee Plywood)*, 126 NLRB 650 (1960). Also, in certain of the "ally" doctrine cases; *J. G. Roy & Sons*, 118 NLRB 286 (1957); *Bachman Machine Company*, 121 NLRB 1229 (1958); the Board found separate ownership of companies so important that in its absence the Board felt compelled to infer that the companies therein were under common control and thus—despite their separate corporate entities—that a union having a labor dispute with one could picket both. The Courts of Appeals, however, reversed both said Board decisions on the ground that common ownership of the involved companies was insufficient to disregard the separate corporate identities of said companies, and thus was insufficient to classify them as a single employer for the purposes of Section 8(b)(4). *J. G. Roy & Sons* v. *N.L.R.B.*, 251 F.2d 771 (C.A. 1, 1958); *Bachman Machine Company* v. *N.L.R.B.*, 266 F.2d 599 (C.A. 8, 1959). Thereafter, the Board acceded to the views of these Courts of Appeals that even common ownership of companies was insufficient to offset their separate corporate identities for the purposes of Section 8(b)(4). See *Amalgamated Lithographers*, 130 NLRB 985, 989, n. 12 and related text; and *Miami Newspaper Printing Pressmen*, 138 NLRB 1346, particularly at page 1352 where the Trial Examiner stated:

> . . . By citing the court decisions in the *Roy* and

> *Bachman* cases, the Board unambiguously indicated that it acquiesced in the principle enunciated by the Circuit Courts of Appeals in said cases that in order to establish that two corporations are a single employer with respect to Section 8(b)(4), there must be common ownership and active, not merely potential, common control.

Accordingly, in 1962 we have the Board in *Miami Newspaper*—where the companies were commonly owned—emphasizing the importance of separate corporate identity to accord a newspaper the protection of Section 8(b)(4). And now and in 1961 (both before and after the *Miami Newspaper* case) we have the Board urging the immateriality of separate corporate identity *and* ownership to deny the protection of Section 8(b)(4) to a railroad. Patently, it is submitted, the Board's treatment of the railroad herein is disparate and improper.

It is suggested that the Board might well have looked to the language of this Court in *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675, where the Court rejected a contention that the close physical proximity and business relationship of two employers should deny the secondary employer the protection of Section 8(b)(4). It said (p. 690):

> The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.

Even more well established are the concepts of private property and ownership. Indeed, the entire economic structure of this country is based on these concepts; and, it is submitted, it would be unconscionable to allow any Board decision to stand—including this one—which is premised on the proposition that they are immaterial.

**E. The Board's Decision Herein is Contrary to Law and Finds no Support in the Opinion of this Court in the General Electric case.**

The case upon which the Board relies to support its decision below is *Local 761, Electrical Workers* v. *N.L.R.B.*, 366 U.S. 667 (1961). Its reliance is misplaced.

The *General Electric* case arose out of a strike at General Electric's Louisville, Kentucky, plant by the certified union at the plant. Picketing was conducted at all plant gates, including a separate gate reserved exclusively for employees of outside contractors doing work at the plant. The Board found the picketing of the separate gate to be a violation of Section 8(b)(4)(A) of the Taft-Hartley Act because its object was "to enmesh" employees of neutral employers in the union's dispute with General Electric, thereby encouraging these employees to engage in a concerted refusal to work with an object of forcing the neutral employers to cease doing business with General Electric.[11] Enforcement of the Board order was granted by the Court of Appeals for the District of Columbia Circuit.[12]

The Supreme Court, quoting with approval the opinion of the court in *United Steelworkers of America (Phelps Dodge Refining Co.)* v. *N.L.R.B.*, 289 F.2d 591 (C.A. 2, 1961), remanded the case, holding that picketing of the separate gate was unlawful only if use of the gate was confined to neutral employees performing work unrelated to the normal operations of the struck employer.

It is here emphasized that unlike the railroad gate in the instant case, the gate in *General Electric* was owned and

[11] *Local 761, Electrical Workers (General Electric Co.)*, 123 NLRB 1547, 1550 (1959).

[12] *Local 761, Electrical Workers (General Electric Co.)* v. *N.L.R.B.*, 278 F.2d 282 (C.A. D.C., 1960).

controlled by the primary employer, and opened upon premises which were owned by the primary employer and upon which the employees of the primary employer also worked. With such emphasis, it can be seen that the Court in *General Electric* had no reason to and did not attempt to change the rules regarding picketing at common or secondary premises *but merely placed an additional restriction on picketing at primary premises.* This is evident by the Court's approving citation—in *General Electric*—of *Moore Dry Dock*, 92 NLRB 547, the Board's lead common situs case. The Court stated (366 U.S. 667, 679):

> . . . The application of the *Dry Dock* tests to *limit the picketing effects to the employees of the employer against whom the dispute is directed* carries out the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Bldg. & Constr. Trades Council, supra* (341 US at 692). (Emphasis supplied)

Accordingly, it is still the rule even in common situs cases (where premises are owned by a neutral or secondary employer) that the union may not—as it did in the instant case—specifically direct its picketing activities at neutral employees in a deliberate effort to enmesh them in a labor dispute not their own. The *General Electric* case only holds, it is submitted, that picketing at premises owned by the primary employer may *still* be proscribed under the "enmeshing" theory where the work of the neutral employees *at the primary premises* does not relate to the normal operations of the primary employer. In this regard, we note that the court in *General Electric* singled out for

attention the Board's decision in *Crystal Palace Market*, 116 NLRB 856 thusly (366 U.S. 667, 678-679):

> The Board's application of the *Dry Dock* standards to picketing at the premises of the struck employer was made more explicit in *Retail Fruit & Vegetable Clerks (Crystal Palace Market)*, 116 NLRB 856. The owner of a large common market operated some of the shops within, and leased out others to independent sellers. The union, although given permission to picket the owner's individual stands, chose to picket outside the entire market. The Board held that this action was violative of §8(b)(4)(A) in that the union did not attempt to minimize the effect of its picketing, as required in a common-situs case, on the operations of the neutral employers utilizing the market. "We believe . . . that the foregoing principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer." 116 NLRB, at 859. . . . The Board made clear that its decision did not affect situations where picketing which had effects on neutral third parties who dealt with the employer occurred at premises occupied solely by him. "In such cases, we adhere to the rule established by the Board . . . that more latitude be given to picketing at such separate primary premises than at premises occupied in part (or entirely) by secondary employers." 116 NLRB, at 860, note 10.

In sum, Carrier submits that although the court in *General Electric* gave heed to the "balancing of interests" approach —used in common situs cases—to resolve the primary picketing problem involved in *General Electric*, it did not intend to disturb the existing balance and law relating to picketing at premises not owned or occupied solely by the primary employer.

Carrier further submits that petitioners' picketing herein was purely secondary and, therefore, that no balancing of

interests is required. Again, the picketed premises herein were solely owned and occupied by the secondary employer; and the primary employees did not work or enter upon said secondary premises. Further, although petitioners had no dispute with the railroad or its employees, they deliberately directed picketing and violence at individuals employed by the railroad at the secondary premises. Nor is there involved any roving or "ambulatory" situs of the primary employer. And, of course, as the Board concedes (Bd. Br. p. 12), petitioners' picketing, threats, restraint and coercion here complained of fall within the liberal proscription of Section 8(b)(4)(i) and (ii)(B) of the Act. We know of no case involving even similar facts and union conduct where the Board or any court found it necessary to "balance interests" before proscribing such purely secondary conduct. As stated by Senator Taft (93 Cong. Record 4198) in discussing Section 8(b)(4):[13]

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts.

Accordingly, the Congress enacted Section 8(b)(4). The Board having refused to give effect to said section herein, its decision should be set aside. In the instant case there were eight gates leading directly to Carrier's property which the petitioners could and did picket (R. 316, 311; G.C. Exh. 9). Under such circumstances, to hold that picketing at the separate property of the railroad must be permitted in order to maintain effective primary picketing is to hold that the petitioners' interests are not protected

[13] Senator Taft was the Senate sponsor of the bill containing said section and was the chairman of the Senate Committee on Labor and Public Welfare in charge of the bill.

unless they can maintain a secondary boycott. The purpose of Section 8(b)(4), it is submitted, is the proscription and not the furtherance, of secondary boycotts.

## II. ASSUMING ARGUENDO THAT THE BALANCING OF INTERESTS DOCTRINE IS GENERALLY APPLICABLE TO THIS CASE, THE BOARD STILL ERRED IN REFUSING TO FIND THAT THE UNIONS' THREATS TO, AND RESTRAINT AND COERCION OF, RAILROAD PERSONNEL WAS A VIOLATION OF SECTION 8(b)(4)(ii)(B) OF THE ACT.

In this case, as detailed above, the unions threatened, restrained and coerced personnel of the secondary railroad employer, including supervisors, with the object of forcing the railroad to cease doing business with Carrier. Moreover, the union conduct took place at and near the railroad's gate located on and leading to railroad property.

Clearly, and on these facts, petitioners have committed a classic violation of Section 8(b)(4)(ii)(B). At a completely secondary premise they have directed threats specifically at a secondary "person" for an unlawful object. The Board and petitioners, however, assert that the union conduct complained of took place at a primary situs and, therefore, that the balancing of interests doctrine employed by this Court in *General Electric* compels a finding that such union conduct did not violate Section 8(b)(4). On this point, Carrier's position is that even if petitioners' threats and violence in fact occurred at a place that would generally require application of the "balancing" doctrine, such conduct was still violative of Section 8(b)(4)(ii)(B) of the Act.

Thus, in *General Electric*, this Court, after first stressing

that the picketing therein complained of was peaceful in nature (366 U.S. 667, at p. 670), went on to base its conclusion on a detailed analysis and evaluation of common situs cases wherein the paramount consideration was to effect a "balance" between the right of unions to conduct peaceful primary picketing and the right of neutral employers to conduct their businesses without interference.

Both of these sometimes conflicting rights, which the courts balance in common situs cases, are bestowed on the parties by the National Labor Relations Act. The employer's right to be shielded from labor controversies not his own is as set forth in Section 8(b)(4), whereas Sections 7 and 13 of the Act safeguard a union's right to engage in concerted activities, including a strike, against the employer with which the union is engaged in a primary labor dispute. *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 687.

In the instant case, the scale on the railroad's side of this common situs balance is normally weighted. The railroad had no dispute with petitioners. It was pursuing its normal business on its own property. However, insofar as petitioners' threats, restraint and coercion are concerned, the scale on their side of the balance is empty. It is empty because the Board had explicitly decided herein that such conduct was violative of Section 8(b)(1)(A) of the Act. And thus condemned by the Act, it can hardly be said that such conduct is a right thereunder. Nor is such conduct even protected by the Act. As once stated by the now Solicitor General:

> Although section 8(b) regulates only the conduct of labor organizations and section 7 deals with the rights of employees, it seems plain that the group activities which section 8(b) forbids a labor organization to lead must fall outside the protection of section 7

> when employees engage in them either with or without the direction of a union. To hold otherwise would disregard legislative history . . . and create an unwarranted anomaly. In the absence of union sponsorship there may be no need for government intervention but surely the activities themselves have no greater claim to affirmative protection.[14]

Moreover, the proviso to Section 8(b)(4)(B)[15] exhibits concern only that said clause (B) shall not impinge upon a primary strike or primary picketing *where such strike or picketing is not otherwise unlawful.* There is no statutory solicitation—either in the proviso to said clause (B) or elsewhere—for conduct such as petitioners' herein, which is not only violative of Section 8(b)(1)(A), but which is specifically proscribed by Section 8(b)(4)(ii)(B). As Senator Morse realized,[16] Section 8(b)(4)(ii) does not limit its prohibition to a threat to strike or to induce a strike. The section prohibits *any* threat to a secondary "person"; and, it is submitted, there is no reason in logic, law, legislative history or common justice to excuse or protect violence or threats of physical violence on the basis of where they were made or how they were transmitted. Such conduct is equally vicious at any location and should be equally condemned. Petitioners engaged in such violence and made such threats herein; and it specifically directed them at a secondary "person" with the object of making said person cease doing business with Carrier.

In sum, petitioners have done what is specifically prohibited by the language of Section 8(b)(4)(ii)(B) and they

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[14] *The Right to Engage in Concerted Activities*, Archibald Cox, 26 Ind. L.J. 319, 325 (1951).

[15] "Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

[16] 105 Daily Cong. Record 1426, September 3, 1959.

have done these things without even the color of support from any balancing right under the Act. Under such circumstances, Carrier submits that to depart from the plain language of the statute to excuse petitioners' conduct could only have one result—the encouragement of violence and strong-arm tactics to carry out effective secondary boycotts.[17]

[17] The reliance of the Board majority on *Labor Board* v. *International Rice Milling Co.*, 341 U.S. 665 (1951) in refusing to find a violation of Section 8(b)(4)(ii)(B) is misplaced. In that case this Court held that union violence could not overcome or replace the Board's failure to show the union's object was to secure concerted activity. In the instant case there are no missing elements of proof. On the contrary, it is the Board and petitioners which seek to be excused from the precise terms and requirements of the Act.

## CONCLUSION

For the reasons set forth above, the judgment in the Court of Appeals below should be affirmed.

Respectfully submitted,

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